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No. 86-252

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ALOHA AIRLINES, INC.

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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Respondent neither denies nor addresses the marked conflict among the circuits in applying this Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)

retroactively. Instead, Respondent urges this court to accept its contention that the mere passage of time will resolve this conflict by mooting it, a proposition totally at odds with one of the underpinnings of DelCostello, uniformity.

Having failed to address the conflict among the circuits, Respondent not surprisingly ignores an additional conflict among the circuits, whether to analyze the factors set forth in this Court's decision in Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2nd Cir. 198__), cert. denied, ___ U.S. ___, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984) (Applying DelCostello retroactively in

RLA case without Huson analysis). That conflict cannot be resolved by the mere passage of time and reflects a division among the Courts of Appeals in how to determine the retroactive effect of this Court's decisions. That conflict transcends cases arising either under the Railway Labor Act ("RLA"), 45 U.S.C. §151, et seq. or the Taft-Hartley Act, 29 U.S.C. §101 et seq. and signals a departure from the presumption of retroactivity which accompanies this Court's decisions. Bradley v. Richmond School Board, 446 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); Gulf Off Shore Company v.

Mobil Oil Corp., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981).[1/]

Neither time nor the repeated denial of certiorari by this Court in cases presenting the retroactivity question will resolve the conflict. This Court's holding in DelCostello has been applied to not only "hybrid" actions, those against the employee's union for the duty of fair representation and against their employer for breach of the collective bargaining agreement under both the Taft-Hartley Act and the Railway Labor

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[1/] When this Court has not intended a holding to apply retroactively, it has expressly stated so. Northern Pipeline Company v. Marathon Pipeline Company, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598, 625-626 (1982).

Act, but has also been applied, as in this case, to pure statutory violations and to other actions arising under federal labor laws.[2/]

The decisions of the Seventh Circuit in Brotherhood of Locomotive Engineers v. Atchison, Topeka, and Santa Fe Railway Company, 768 F.2d 914 (1985) and the Second Circuit in

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[2/] See International Association of Machinists v. Allied Products Corp., 786 F.2d 1561 (11th Cir. 1986) (Action to compel arbitration held untimely when not filed within six months, union's argument against retroactivity rejected); Vallone v. Local Union No. 705, 755 F.2d 520 (7th Cir. 1985) (per curiam) (Applying six month statute of limitations for claims under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401); Hogan v. Brotherhood of Railway, Airline, and Steamship Clerks, 629 F.Supp. 1166 (W.D. Va. 1986) (Action solely against union under RLA, retroactivity denied).

Robinson v. Pan American World Airways, Inc., 777 F.2d 84 (1985) establish that this Court's holding in DelCostello will be applied retroactively to actions alleging statutory breaches of the RLA, and thus create a clear conflict with the decision in this case. Robinson, like this action, was based on claims which had accrued before DelCostello was decided but which was not filed until after DelCostello.[3/] The action in Robinson was timely under the then applicable state statute of limitations, but the Second Circuit's decision leaves no room to contend as Respondent does that its

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[3/] 597 F.Supp. 1063 (S.D.N.Y. 1984).

holding would only be given prospective effect.

Respondent's final contention that the retroactivity questions raised by DelCostello should be addressed in an action arising under the Taft-Hartley Act is likewise without merit. There is no conflict among the Courts of Appeals on whether to apply DelCostello to cases arising under the RLA, and indeed Respondent does not suggest that one exists. Respondent's claim that the sheer volume of Taft-Hartley litigation as compared to RLA litigation warrants denial of the Petition is baseless since it provides this Court with only cases reported, not actions decided or new cases brought (Brief in Opposition, Appendices A & B).

This case is an appropriate vehicle for resolving the conflict among the Circuits on whether to utilize a Huson analysis and if so, does Huson prevent a retroactive application of DelCostello. Although Respondent would relegate intra-circuit conflicts to being merely sui genris, such conflicts will be encouraged unless and until this Court conclusively resolves the retroactivity issue.[4/]

[4/] See Zemonick v. Consolidation Coal Company, Inc., 762 F.2d 381, 389 (4th Cir. 1985) (Irvin, J. dissenting); Byrne v. Buffalo Creek Railroad Company, 765 F.2d 364, 367 (2nd Cir. 1985) (Van Graafeland, J. dissenting).

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition for certiorari, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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